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In The

Supreme Court of the United States

October Term, 1990

JAMES P. LEHNERT, et al.,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Landmark Legal Foundation is a not-for-profit public interest law foundation committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the United States Constitution and individual rights. The Foundation, through original action litigation and amicus curiae briefs, has fervently supported the right of individuals to freely exercise their

First Amendment beliefs to support or oppose the political philosophy of their choice. Moreover, the Foundation has strenuously opposed state and federal governmental restrictions on and hindrances to the free enterprise system and the economic rights of individuals.

Landmark has appeared as amicus curiae before this Court in a number of cases involving a broad range of public interest issues. Landmark submits this brief to assist the Court in its deliberations on the significant personal and economic liberty questions presented by this case.

SUMMARY OF ARGUMENT

Significant infringement of the First Amendment rights of dissenting non-union members of union-shop collective bargaining units has been countenanced by this Court in the name of industrial peace. The degree of infringement, however, is limited to requiring dissenting non-union members to funding expenditures reasonably or necessarily related to the agent's responsibilities as the exclusive representative of the employees in the bargaining unit in dealing with the employer – even though the non-union employee chooses not to be a member of the union. This Court has not until now been presented the opportunity to clearly define what union activities are reasonably and necessarily related to the responsibilities of an exclusive bargaining agent in dealing with an employer.

Public employees may not constitutionally be compelled to subsidize the political ideology of their union

representative, nor should they be forced to fund the general day-to-day operations of the union with which they have chosen not to associate. A labor union which, pursuant to state statute, compels non-union workers to financially support its political activities and other general activities unrelated to its responsibility as exclusive bargaining agent burdens the free speech and association rights of those non-union workers.

Employees in the Ferris State College faculty bargaining unit who chose not to join the union have been forced to pay for activities which include lobbying in the state legislature, electioneering, organizing, and public relations, for expenses related to other bargaining units and for expenses related to preparation for illegal strikes. These expenses are not reasonably or necessarily related to the union's responsibilities as exclusive bargaining agent on behalf of the Ferris faculty unit. Therefore, this Court should hold that these expenditures are not constitutionally chargeable to dissenting non-union members of the bargaining group.

ARGUMENT

I.

THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN PERMITTING UNIONS TO EXACT DUES FROM DISSENTING NON-UNION MEMBERS OF A CLOSED SHOP BARGAINING UNIT TO PAY EXPENSES UNRELATED TO BARGAINING UNIT NEGOTIATIONS OR CONTRACT ADMINISTRATION.

With the Sixth Circuit's decision in this case in their arsenals, bargaining agents will now have unfettered

power to force dissenting non-union members of union shop bargaining units to subsidize the unions' organizational and political agendas. Far from merely protecting unions from "free-riders," the lower court's decision instead compounds an already significant infringement on the First Amendment rights to free speech and association of dissenting non-union members in union-shop bargaining units. The applicable precedent of this Court is stretched far beyond reason by the Circuit Court's analysis in approving the chargeability to dissenting non-union members of expenses not reasonably or necessarily related to the unions' responsibilities as the exclusive representative of the employees in the bargaining unit in dealing with the employer.

A. *Abood* And *Ellis* Limit Constitutionally Chargeable Expenses To Those Reasonably Employed To Implement Or Effectuate The Duties Of The Union As Exclusive Representative Of The Employees In The Bargaining Unit.

This Court's decisions "establish with unmistakeable clarity that the freedom of the individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 233 (1977) (citations omitted). The government may not prevent a person from associating with a particular group or force an individual to join a particular group. "The right to be free from compelled associations is found in our conviction that individuals may not be forced to join or support positions

or views which they find objectionable on moral, ideological, or personal grounds." *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 297 (1984) (Brennan, J., dissenting).

"Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood*, 431 U.S. at 234. Accordingly, this Court held that dissenting non-member employees may constitutionally prevent a union from spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. *Id.*

While recognizing that differences in the nature of public employment and private employment do exist, this Court in *Abood* found that those differences "simply do not translate into differences in First Amendment rights." *Id.* at 232. Therefore, even though the line between what expenditures may or may not constitutionally be chargeable might be "hazier" in the public employment sector, *id.* at 236, there exists no justification for tolerating a greater infringement of a dissenting non-union public employee's First Amendment protections. The Circuit Court's decision, however, ignores the principles set forth in *Abood* in favor of a standard which is both unreasonable and constitutionally infirm.

The focus in all cases clearly must be on the relation of union activities to the collective bargaining unit. *Id.* Public employees may not constitutionally be compelled

to subsidize the political ideology of their union representative under the guise of an agency shop arrangement. *Id.* at 235-236.

The test for the constitutional chargeability of expenses to dissenting non-members is whether the challenged expenses are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of employees *in dealing with the employer as an exclusive representative on labor-management issues. Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984) (emphasis added). It necessarily follows, therefore, that activities beyond those dealing directly with the employer as an exclusive representative on labor management issues, in order to constitutionally be chargeable, must also be necessarily or reasonably incurred on behalf of the bargaining unit in its relationship with the employer. In no instance, however, may dissenting non-union members constitutionally be compelled to subsidize the political ideology of their union representative under the guise of an agency shop arrangement. *Ellis*, 466 U.S. at 447; *Abood*, 431 U.S. at 235-236.

This Court recognized in *Abood* and *Ellis* that, by even allowing the union shop, a significant impingement on dissenting non-union members' First Amendment rights has been countenanced. *Ellis*, 466 U.S. at 455; *Abood*, 431 U.S. at 222. The limiting nature of those decisions protects dissenting non-union employees from further, unjustified deprivation. By allowing expenditures not related to the exclusive representation of the employee in dealing with the employer, however, the decision below destroys the integrity of those protections.

B. The Decision Below Places No Meaningful Limit On The Power Of Unions To Force Dissenting Non-Members To Subsidize Political Activity In Violation Of Their First Amendment Rights.

Any union activity will arguably and ultimately have some bearing on collective bargaining efforts by a union representative on behalf of a bargaining unit. Its business practices, charitable endeavors and political activities – all ultimately affect the negotiating effectiveness of a bargaining agent. However, not all of these activities may constitutionally be charged to non-union members of a union shop bargaining unit. The relationship each activity has to actual bargaining efforts and agreement administration is what determines the constitutional chargeability of an activity to a dissenting non-member employee. *See Ellis*, 466 U.S. at 455. The standard under *Ellis* is that the relationship must be significant. The Sixth Circuit's standard in this case, however, is that the relationship need only be *de minimus*. *See Lehnert v. Ferris Faculty Association*, 881 F.2d 1388, 1394 (Merritt, J., concurring in part, dissenting in part).

The Court of Appeals sanctioned the chargeability of expenditures which included union lobbying in the state legislatures; union activities in state and local elections involving candidates and issues; organizing, public relations and other activities relating to teacher bargaining units in schools other than Ferris State College; general public relations activities at the state and national levels; and, perhaps most remarkably, the union's preparation for an illegal strike at Ferris State College – a strike which the dissenting faculty opposed. *See id.* The only such expenses actually incurred by the bargaining agent

directly relating to negotiations on behalf of the bargaining unit were those related to preparation for an illegal strike. Preparation for illegal activities surely was not contemplated as necessary or reasonable by this Court under the *Ellis* test.

As Judge Merritt illustrated so clearly in his dissent below, "dissenters should not be forced to pay the expenses for planning an unlawful act." *Id.* at 1396. Respondents suggest that because no strike actually occurred dissenting non-union members of the bargaining unit should have no constitutional objection to subsidizing efforts merely to threaten illegal activity. Threatening illegal activity, however, precisely illustrates the kind of unreasonable, unnecessary and unconscionable activity that dissenting non-union members of bargaining units seek to *dis*-associate themselves from by not joining the union. It is an outrage to suggest that dissenters ought to have to pay for that which they find morally repulsive. In no way do such expenditures satisfy the standards of *Ellis*.

The remaining expenditures approved below can only be described as general, undifferentiated costs of lobbying the legislature and other day-to-day union operations not related to the Ferris State College bargaining unit. *See id.* at 1394-1395. In rationalizing those costs, the Court of Appeals erroneously extends *Abood* and *Ellis* at the expense of dissenting non-union members' further weakened First Amendment rights.

To justify these additional infringements, the Circuit Court disregarded well-settled principles of constitutional law. Any governmental deprivation of an individual's constitutional rights must first be justified by a

compelling governmental interest and, in this case, must be able to stand up to the strict First Amendment scrutiny. The Sixth Circuit abandons these fundamental principles by requiring only the most casual connection between union activities and the bargaining unit in permitting the chargeability of expenditures to dissenting non-union members of the bargaining unit.

II.

THIS COURT SHOULD STRICTLY LIMIT UNION ACTIVITIES WHICH CONSTITUTIONALLY CAN BE FINANCED FROM DISSENTING NON-UNION MEMBER EMPLOYEES' SERVICE FEES TO THOSE REASONABLY AND DEMONSTRABLY EMPLOYED TO IMPLEMENT OR EFFECTUATE THE DUTIES OF THE UNION AS EXCLUSIVE REPRESENTATIVE OF THE EMPLOYEES IN THE BARGAINING UNIT.

The scope of expenditures that may constitutionally be chargeable to dissenting non-union member employees has been greatly expanded by the standard set forth by the Sixth Circuit Court of Appeals in this case. The lower court's decision leaves dissenting non-members no alternative but to subsidize the political ideology and activism of their bargaining agent. Compelled subsidization of political ideology is a clear violation of the First Amendment, a violation which goes to the very heart of this constitutional safeguard. In *Abood*, "[this] Court acknowledged Thomas Jefferson's view that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical'." *Keller v. State Bar of California*, 58 U.S.L.W. 4661, 4663 (U.S. June 4, 1990) (quoting *Abood*,

supra, 431 U.S. at 234-235, n.31). It is also unconstitutional.

One group may not, with the authority of a state statute, coerce another group into financing its political beliefs, convictions or activities. Unions may not, therefore, constitutionally use agency fees for political activities over the objections of non-union employees. Further, unions may not constitutionally use agency fees to subsidize their organizational expenses and activities over the objections of non-union employees.

It is well established that non-union members of a bargaining unit may only constitutionally be charged for expenditures of the bargaining agent necessarily and reasonably incurred in the negotiation and administration of contracts with the bargaining unit. *Ellis*, 466 U.S. at 448. This Court has not until now, however, been presented with a case in which it could reach the "difficult line drawing questions," *Abood*, 451 U.S. at 236, between collective bargaining activities for which contribution can be compelled and activities unrelated to the collective bargaining process. *Id.* An important opportunity to maintain the integrity of individual First Amendment rights is now before this Court. The line must clearly be drawn at expenditures reasonably, necessarily and demonstrably employed for the direct implementation or effectuation of the duties of the union as exclusive representative *of the employees in the bargaining unit*. As pointed out by Judge Merritt's dissent below, "*Ellis* establishes the clear principle that the union expenses charged in a closed shop must relate closely to the activities of the bargaining unit of the dissenting members. The general political, lobbying, public relations and organizing activities of the NEA

and its state affiliate [in this case] obviously have no such relationship [to the Ferris faculty bargaining unit]." *Lehnert, supra*, 881 F.2d at 1395. (Merritt, concurring in part, dissenting in part).

The First Amendment free speech and association protections guaranteed the dissenting non-union members of the Ferris faculty collective-bargaining unit – and similarly situated individuals in collective-bargaining units throughout this workforce – have been dramatically and unjustifiably diminished by the Circuit Court's decision in this case.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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